Ronald Beadle v Hamzah HM Saman & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4(S6)–21–64 OF 2000
TENGKU MAIMUN JC
22 FEBRUARY 2007

Revenue Law — Income tax — Recovery by government of taxes due and payable — Power of Director General to issue certificate under s 104 of the Income Tax Act 1967 to prevent taxpayer from leaving Malaysia until tax settled — Whether there was basis in law and fact to issue certificate against plaintiff — Whether Director General acted arbitrarily and unreasonably in issuing certificate — Income Tax Act 1967 s 104

Tort — Damages — Negligence — Wrongful confinement — Director General to issue certificate under s 104 of the Income Tax Act 1967 to prevent plaintiff from leaving Malaysia until tax settled — Whether there was wrongful acts and neglects or defaults committed by Director General — Whether there was loss of earnings, general and exemplary damages to be awarded

The plaintiff, a British citizen started his employment with SEA Helicopter (M) Sdn Bhd ('SEAH') on 29 February 1972 and he resigned from SEAH effective from 31 December 1980. When the plaintiff left SEAH, a total sum of RM27,943 had been deducted from his monthly salaries and held by SEAH towards payment of his outstanding personal income tax. These deductions were made in accordance with the Direction to Employer to Deduct Tax Forms issued by the second defendant, Jabatan Hasil Dalam Negeri ('JHDN') to SEAH. Pursuant to s 83 of the Income Tax Act 1967 ('Act') SEAH notified JHDN of the plaintiff's resignation. After receiving the notification from SEAH, JHDN wrote to the plaintiff on 23 February 1981 informing him that SEAH had been instructed to withhold all sums payable by SEAH to the plaintiff pending clearance from JHDN and that the plaintiff was required to notify JHDN should there be a change of address. JHDN then directed SEAH to remit to it a sum of RM22,778.70 being the plaintiff's personal income tax. SEAH failed to remit the said sum to JHDN and as a result, the third defendant (Government of Malaysia) issued a summons against SEAH for recovery of the said sum and obtained judgment on 24 October 1981. Notwithstanding the fact that judgment was obtained against SEAH for the recovery of the said income tax on 24 October 1981, the first defendant on 17 December 1981 issued a certificate under s 104 of the Act as against the plaintiff resulting in the plaintiff's British International passport being taken into custody by the Sentul Police Station on 3 April 1982. The plaintiff's claim against the defendants was for RM2,935,568.65 being loss of potential earnings, for general and exemplary damages, interest and costs for the wrongful acts and neglects or defaults committed by the first defendant as a public officer acting as an agent of the third defendant. The plaintiff's cause of action was based on tort and negligence arising out of the issuance of a certificate by the first defendant.

Held:

(1) Given the fact that SEAH had already deducted the plaintiff's monthly salaries and the defendant had already directed the claim for the recovery of the tax against SEAH and had in fact obtained judgment against SEAH on 24 October 1981, there was no tax payable personally by the plaintiff to the third defendant as at the date when the first defendant issued the directive on 17 December 1981 (see para 20).

(2) It was incumbent upon the defendants to make known the basis of the first defendant's opinion which necessitates the issuance of the certificate. However, the defendants saw it fit not to adduce any evidence. In the absence of any evidence from the defendant as to how the first defendant formed his opinion and in the light of the judgment obtained against SEAH, there was no basis in law and in fact for the first defendant to issue the certificate (see para 22).

(3) The first defendant had acted arbitrarily and unreasonably in issuing the certificate and that the action was not in consonant with the purpose of s 104 of the Act. Section 104 of the Act empowers the first defendant to issue the certificate for the purposes of collecting and recovering assessed tax from the plaintiff and it is the requirement of s 103 of the Act that a person pays his assessed tax on service of the notice of assessment on him. There was no evidence whatsoever that JHDN had ever made any demand to the plaintiff for the payment of the income tax and neither did JHDN issue a Notice of Assessment to the plaintiff. When the plaintiff's salaries had been deducted by SEAH for the purposes of payment of the plaintiff's income tax and judgment was already obtained against SEAH on 24 October 1981, there was no real purpose for the first defendant in issuing the directive on 17 December 1981 against the plaintiff since s 104(1) of the Act in the circumstances which would no longer be applicable. Consequently there was no necessity for the first defendant to issue the certificate except to simply assert that he has the power to do so (see para 27).

(4) On the balance of probabilities the plaintiff had failed to prove the loss of earnings. The plaintiff's testimony that he could have gone to work in Western Europe as an Aviation Department Manager with such amount of salary is merely theoretical which cannot serve as a proof. In the premises this claim was not allowed. However, for the suffering arising out of the defendant's conduct, an award of general damages in the sum of RM2m to the plaintiff would be fair and reasonable. The plaintiff should also be entitled to exemplary damages. In the absence of a fixed formula or rate in awarding exemplary damages, a sum of RM1m would be fair in the circumstances (see paras 29, 31–32).

[Bahasa Malaysia summary

Plaintif seorang warganegara British, memulakan pekerjaannya dengan SEA Helicopter (M) Sdn Bhd ('SEAH') pada 29 Februari 1972 dan beliau telah meletak jawatan daripada SEAH berkuat kuasa daripada 31 Disember 1980. Apabila plaintif meninggalkan SEAH, sejumlah RM27,943 telah ditolak daripada gaji bulanan beliau dan dipegang oleh SEAH untuk bayaran cukai pendapatan peribadi beliau yang tertunggak. Tolakan ini dibuat berdasarkan borang arahan kepada majikan untuk

potongan cukai yang dikeluarkan oleh defendan kedua, Jabatan Hasil Dalam Negeri ('JHDN') kepada SEAH. Berdasarkan kepada s 83 Akta Cukai Pendapatan 1967 ('Akta'), SEAH telah memberitahu JHDN berkenaan dengan perletakkan jawatan plaintif. Selepas menerima pemberitahuan daripada SEAH, JHDN telah menulis kepada plaintif pada 23 Februari 1981 memberitahu beliau bahawa SEAH telah diarahkan untuk menangguhkan kesemua jumlah yang perlu dibayar oleh SEAH kepada plaintif sementara menunggu pelepasan daripada JHDN dan plaintif dikehendaki untuk memberitahu JHDN jika terdapatnya pertukaran alamat. JHDN kemudiannya mengarahkan SEAH untuk membayar sejumlah RM22,778.70 sebagai cukai pendapatan peribadi plaintif. SEAH gagal membayar jumlah tersebut kepada JHDN dan dengan itu, defendan ketiga (Kerajaan Malaysia) mengeluarkan saman terhadap SEAH untuk mendapatkan jumlah wang tersebut dan telah mendapatkan penghakiman pada 24 Oktober 1981. Meskipun penghakiman telah diperolehi terhadap SEAH untuk mendapatkan semula cukai pendapatan tersebut pada 24 Oktober 1981, defendan pertama pada 17 Disember 1981 telah mengeluarkan satu perakuan di bawah s 104 Akta tersebut terhadap plaintif yang menyebabkan pasport antarabangsa British plaintif diambil serta disimpan oleh Balai Polis Sentul pada 3 April 1982. Plaintif menuntut terhadap defendan-defendan sejumlah RM2,935,568.65 untuk kehilangan pendapatan yang berpotensi, gantirugi am dan teladan, faedah dan kos untuk tindakan salah dan kecuaian atau kemungkiran yang dilakukan oleh defendan pertama sebagai pegawai awam yang bertindak sebagai agen kepada defendan ketiga. Kausa tindakan plaintif adalah berdasarkan tort dan kecuaian yang timbul daripada pengeluaran perakuan oleh defendan pertama.

Diputuskan:

(1) Berkenaan dengan fakta bahawa SEAH telah pun menolak gaji bulanan plaintif dan defendan telah pun mengarahkan bahawa tuntutan untuk mendapatkan kembali cukai terhadap SEAH dan juga telah memperolehi penghakiman terhadap SEAH pada 24 Oktober 1981, tidak terdapatnya cukai yang perlu dibayar sendiri oleh plaintif kepada defendan ketiga setakat tarikh apabila defendan pertama mengeluarkan arahan pada 17 Disember 1981 (lihat perenggan 20).

(2) Adalah kewajipan defendan-defendan untuk mengetahui dasar pandangan defendan pertama berkenaan dengan keperluan mengeluarkan perakuan. Tetapi, defendan-defendan melihat ianya adalah sesuai untuk tidak mengemukakan apa-apa bukti. Dengan ketiadaan apa-apa bukti daripada defendan berkenaan dengan bagai mana defendan pertama membentuk pandangannya dan berkenaan dengan penghakiman yang diperolehi terhadap SEAH, tidak terdapat asas dalam undang-undang dan untuk defendan pertama mengeluarkan perakuan (lihat perenggan 22).

(3) Defendan pertama telah bertindak dengan sewenang-wenangnya dan tidak wajar dalam mengeluarkan perakuan dan tindakan tersebut adalah tidak selaras dengan maksud s 104 Akta tersebut. Seksyen 104 Akta tersebut memberikan kuasa kepada defendan pertama untuk mengeluarkan perakuan bagi tujuan untuk mengutip dan mendapatkan semula cukai yang telah ditaksirkan daripada plaintif dan ianya adalah keperluan s 103 Akta tersebut bahawa

seseorang membayar cukainya yang ditaksirkan apabila disampaikan notis taksiran kepadanya. Tidak terdapatnya bukti atau apa jua yang JHDN telah membuat tuntutan kepada plaintif untuk bayaran cukai pendapatan dan JHDN mengeluarkan Notis Taksiran kepada plaintif. Apabila gaji plaintif telah ditolak oleh SEAH untuk tujuan pembayaran cukai pendapatan plaintif dan penghakiman telah diperolehi terhadap SEAH pada 24 Oktober 1981, tidak terdapatnya tujuan sebenar untuk defendan pertama mengeluarkan arahan pada 17 Disember 1981 terhadap plaintif apabila s 104(1) Akta tersebut dalam keadaan tersebut tidak lagi terpakai. Oleh yang demikian, tidak terdapatnya keperluan untuk defendan pertama mengeluarkan perakuan kecuali hanya untuk menyatakan bahawa ianya mempunyai kuasa melakukannya (lihat perenggan 27).

(4) Berdasarkan imbangan keberangkalian, plaintif telah gagal membuktikan kehilangan pendapatan. Testimoni plaintif bahawa beliau boleh bekerja di Eropah Barat sebagai seorang Pengurus Jabatan Penerbangan dengan jumlah gaji sebegitu hanyalah teori yang tidak boleh digunakan sebagai bukti. Oleh yang demikian, tuntutan ini tidak dibenarkan. Tetapi, untuk penderitaan yang timbul daripada tindakan defendan, award untuk ganti rugi am untuk jumlah RM2j untuk plaintif adalah adil dan munasabah. Plaintif juga berhak kepada ganti rugi teladan. Dalam ketiadaan formula tertentu atau kadar dalam mengawardkan ganti rugi teladan, sejumlah RM1j adalah adil dalam keadaan ini (lihat perenggan 29, 31–32).]

Notes

For cases on income tax generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2005–2331.

For cases on tort generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1–1577.

Cases referred to

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289 (refd)
Ong Bee Yam v Pengarah Hasil Dalam Negeri Sarawak & Anor [2002] 3 MLJ 389 (refd)
Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (refd)
Premachandra v Major Montague Jayawickrema [1994] 2 Sri LR 90 (refd)
Ronald Beadle v Hamzah HM Saman & Ors [2007] 2 MLJ 201 (refd)
Ronald Beadle v Kerajaan Malaysia [1998] 2 MLJ (refd)
Rookes v Barnard [1964] AC 1129 (refd)
Savrimuthu v PP [1987] 2 MLJ 173 (refd)
Tai Choi Yu v Government Of Malaysia & Ors [1994] 1 MLJ 677 (refd)

Legislation referred to

Income Tax Act 1967 ss 83, 103, 104
Rules of the High Court 1980 O 18 r 19(1)(b), (d)

Jeffery Wong (Noorul Huda Daud & Nalini Sellapan) (Jeffery Wong, Noorul & Lim) for the plaintiff.
Mahiran (Senior Federal Counsel) for the defendant.

Tengku Maimun JC:

[1] The plaintiff's claim against the defendants is for RM2,935,568.65 being loss of potential earnings, for general and exemplary damages, interest and costs for the wrongful acts and neglects or defaults committed by the first defendant as a public officer acting as an agent of the third defendant. The plaintiff's cause of action is based on tort and negligence arising out of the issuance of a certificate by the first defendant, the Assistant Director General of the former Jabatan Hasil Dalam Negeri ('JDHN') under s 104 of the Income Tax Act 1967 ('the Act').

[2] The plaintiff, a British citizen started his employment with SEA Helicopter (M) Sdn Bhd ('SEAH') on 29 February 1972 and he resigned from SEAH effective on 31 December 1980. When the plaintiff left SEAH, a total sum of RM27,943 had been deducted from his monthly salaries and held by SEAH towards payment of his outstanding personal income tax. These deductions were made in accordance with the Direction To Employer To Deduct Tax Forms issued by the JDHN to SEAH (pp 123–130 of Bundle B).

[3] Pursuant to s 83 of the Act, SEAH notified JHDN of the plaintiff's resignation (p 6 of Bundle B). After receiving the notification from SEAH, JHDN wrote to the plaintiff on 23 February 1981 informing him that, SEAH had been instructed to withhold all sums payable by SEAH to the plaintiff pending clearance from JHDN and that the plaintiff was required to notify JHDN should there be a change of address.

[4] The plaintiff replied on 5 March 1981 informing JHDN of his residential address and that he was awaiting the issue of a work permit for him to be employed by Eagle Aviation Services Sdn Bhd, a company incorporated by the plaintiff (p 9 of Bundle B). JHDN then directed SEAH to remit to it a sum of RM22,778.70 being the plaintiff's personal income tax (p 10 of Bundle B). On 30 May 1981 the JHDN also wrote to Eagle Aviation Services Sdn Bhd to inquire about the plaintiff's employment with the company.

[5] SEAH failed to remit the said sum to JHDN and as a result, the third defendant issued a summons against SEAH for recovery of the said sum and obtained judgment on 24 October 1981. On or about 13 February 1984 the third defendant obtained a winding up order against SEAH (pp 24–29 and 30 of Bundle B).

[6] Notwithstanding the fact that judgment was obtained against SEAH for the recovery of the said income tax on 24 October 1981, the first defendant on 17 December 1981 issued a certificate under s 104 of the Act as against the plaintiff resulting in the plaintiff's British International passport being taken into custody by the Sentul Police Station on 3 April 1982.

[7] On 6 April 1982 the plaintiff wrote to the first defendant placing on appeal a request that the first defendant withdrew the certificate dated 17 December 1981.

On 7 April 1982 the plaintiff wrote another letter to the first defendant advising the first defendant that he had just recently received a copy of the judgment against SEAH for the payment of RM22,778.70 in respect of the personal income tax allegedly owed by him. To the plaintiff's letter dated 6 April 1982, the first defendant replied on 22 April 1982 that he was not in a position to withdraw the certificate without giving any reasons. The first defendant did not bother to respond to the other letters written by the plaintiff.

[8] From the moment the plaintiff's British International Passport was taken into custody, the plaintiff had tirelessly communicated with the officers of the JHDN for the return of his passport but to no avail. He then commenced an action in the Kuala Lumpur High Court OS No P31–51–86 (see p 26 of NABOD) to seek the return of his British International Passport.

[9] Sometime in 1986, for reasons best known to them, the third defendant applied to set aside the judgment obtained against SEAH and filed a suit against the plaintiff instead vide Summons No P21–457–86 for the alleged outstanding personal income tax of RM28,160.70 which is inclusive of the sum of RM22,778.70 owed by SEAH to JHDN. The Summons was never served on nor disclosed to the plaintiff until February 1987 when halfway through the hearing of the plaintiff's action for the release of the passport the solicitors for the third defendant requested the court to adjourn the plaintiff's action until their claim has been disposed off.

[10] In the meantime, on or about 11 February 1993 the plaintiff learned that his father was severely ill with cancer of the pancreas and was not expected to live beyond the weekend. A letter was then written to the Malaysian Immigration Department to validate his new European, United Kingdom of Great Britain and Northern Ireland International Passport (which was issued by the British High Commission after being advised by the plaintiff that his British International Passport was taken into custody by the Malaysian police) to travel to the United Kingdom to see his father for one last time. His request was turned down with no apparent reason. On 13 February 1993 the plaintiff received a telegram from his brother that his father had passed away. The plaintiff could not see his father for the last time nor attended his funeral.

[11] On the summons by the third defendant, judgment was subsequently obtained against the plaintiff on 20 November 1996 in the sessions court. Against this judgment, the plaintiff appealed to the High Court whereupon the order of the sessions court was reversed. Abdul Kadir Sulaiman J (as he then was) in *Ronald Beadle v Kerajaan Malaysia* [1998] 2 MLJ 263 at p 207 said:

> Dengan yang demikian, mengikut peruntukan s 107(5) tersebut jika dikenakan kepada situasi kes ini, SEAH adalah bertanggungjawab untuk membayar cukai perayu berasaskan arahan KPHDN tersebut. Apatah lagi di dalam hal ini, potongan telah dibuat... Di dalam kedaan begini KPHDN adalah betul dengan mengambil tindakan melalui Guaman Sivil ke atas SEAH dan telah pun memperolehi penghakiman terhadapnya. Tetapi yang anehnya setelah berusaha sedemikian dan mengambil tindakan menggulung syarikat SEAH, pihaknya telah memohon supaya penghakiman tersebut dibatal dan akibatnya mahkamah telah membatalkan penghakiman tersebut. Dapat difaham sekarang mengapa KPHDN mengambil tindakan untuk membatalkan penghakiman tersebut kerana ia berhasrat untuk

A mengambil tindakan ini ke atas perayu sendiri. Jika pembatalan tidak dibuat pihaknya menampakkan telah mengambil tindakan yang bertindih, sekali terhadap SEAH dan sekali lagi terhadap perayu. Maka oleh kerana prosiding yang teratur telah dijalankan terhadap SEAH berasaskan peruntukan s 107 Akta tindakan ke atas perayu oleh KPHDN untuk mendapat pembayaran cukainya yang berada di tangan SEAH adalah terhapus kerana tanggungan ke atas jumlah wang cukai perayu yang berada di tangan SEAH mengikut
B peruntukan s 107(5) itu adalah berpindah kepada SEAH … nyatalah bahawa tuntutan cukai ke atas perayu oleh responden tidak lagi berbangkit setakat tempoh masa dan jumlah wang yang berada dalam milikan SEAH walaupun penghakiman ke atas SEAH dibatalkan di atas permintaan pihak responden.

C **[12]** The third defendant did not appeal against the above said High Court judgment. Notwithstanding the judgment, the defendants took no steps to either withdraw the certificate or return the plaintiff's British International passport. In fact the passport was never returned to the plaintiff. It had been misplaced by the police! But the plaintiff took the effort to approach the Sentul Police station. A letter from
D the Sentul Police Station was then issued to the Immigration Department to enable the Immigration Department to validate the plaintiff's new European Community, United Kingdom of Great Britain and Northern Ireland International passport on 21 April 1998. The plaintiff left Malaysia for England in March 1999.

E **[13]** The plaintiff therefore claims that his British International passport was detained for 5968 days without any valid reason. Hence his contention that he was falsely imprisoned within West Malaysia and was deprived of liberty of movement and human rights for 5968 days.

F **[14]** In urging the court to dismiss the plaintiff's claim, the learned senior federal counsel submitted, inter alia, that the issuance of the certificate was pursuant to the statutory powers of the first defendant under s 104 of the Act; that there was no duty of care owed by the defendants to the plaintiff; that the plaintiff's claim is statute barred and that the plaintiff was guilty of laches in filing the suit in year 2000 and
G had occasioned prejudice to the defendants because the first defendant had passed away. I failed to see how the learned senior federal counsel considered that the issue of limitation is still alive given the clear judgment of the Court of Appeal in *Ronald Beadle v Hamzah HM Saman & Ors* [2007] 2 MLJ 201 that (at p 210):

H Further, we are also in agreement with the learned counsel for the appellant that during the period when the passport of the appellant was retained by the respondents the damage to the appellant continued. Hence, his cause of action only began to run from the time his passport was released, that is, from 24 April 1998. Since he filed his claim on 21 May 2000 he was therefore well within the 36 months prescribed in the second limb of s 2(a) of PAPA.

I **[15]** The above quoted judgment was in respect of the plaintiff's appeal against the order of the High Court judge in striking out the plaintiff's instant claim against the defendants under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980. The order of the learned judge was reversed by the Court of Appeal, hence the present trial.

[16] As for the defence of laches, I do not see how the defendants are being prejudiced by the death of the first defendant when the records would be kept by the department and hence there would be other relevant officers who could give evidence in court.

[17] In respect of the first defendant's power to issue the directive, s 104(1) of the Act provides:

> The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying:
>
> (a) All tax payable by him (whether or not due or due and payable);
>
> (b) All sums payable by him under s 103 (4), (5) or (5A); and
>
> (c) All debts payable by him under s 107A(2) or 109(2) or 109B(2),
>
> may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their satisfaction.

[18] In *Ong Bee Yam v Pengarah Hasil Dalam Negeri Sarawak & Anor* [2002] 3 MLJ 389, Ian Chin J in considering the meaning of the term 'payable by him' in s 104(1)(a), (b) and (c) said at p 395:

> Therefore, s 104, when it uses the term 'payable by him' had in mind a person being personally liable for the payment of the tax... Section 104, in my view, is directed only at an individual who personally owes the tax.

[19] Given the fact that SEAH had already deducted the plaintiff's monthly salaries and the defendant had already directed the claim for the recovery of the tax against SEAH and had in fact obtained judgment against SEAH on 24 October 1981, clearly there was no tax payable personally by the plaintiff to the third defendant as at the date when the first defendant issued the directive on 17 December 1981.

[20] In *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677, Chin SCJ said at p 682:

> One of the primary functions of the DGIR under the Act is to collect and recover assessed tax effectively, and to do that, he must employ all the modes of recovery authorized under Part VII (ss 103 to 111) of the Act. Action under s 104 is one of the authorized modes. It is the requirement of s 103 of the Act that a person pays his assessed tax on the service of the notice of assessment on him failing which the DGIR may besides using all other authorized modes, proceed to recover in Court the assessed tax as a debt due to the Government, and if judgment is obtained, to execute the judgment.
>
> Under s 104(1) of the Act, the DGIR, if he is of the opinion that a person is about or likely to leave Malaysia without paying all the tax payable by the person, is authorized to issue a certificate requesting the Director of Immigration to prevent the person from leaving Malaysia.

> … But was there justification in the DGIR forming the opinion that the appellant was about or likely to leave Malaysia. The DGIR cannot read the mind of the appellant, and neither would the appellant tell the DGIR if he intends to leave Malaysia without settling his tax. The DGIR would have to base his opinion on information and reports received by him, and on knowledge gathered or acquired in the course of dealing with the appellant's tax affairs. The evidence in the appeal record shows that between June 1988 to April 1990, the appellant travelled extensively overseas and stayed longer in foreign lands than in Malaysia. In the circumstances we find that the DGIR was justified in forming the opinion that the appellant would leave the country without settling his tax.

[21] Based on the aforesaid Supreme Court judgment, it is incumbent upon the defendants to make known the basis of the first defendant's opinion which necessitates the issuance of the certificate. However the defendants here saw it fit not to adduce any evidence. After the plaintiff had closed his case, the learned senior federal counsel informed the court that the first defendant had passed away on 28 March 1998 and although it is probable that the records on the tax affairs of the plaintiff would be kept by the department and not the first defendant personally and that any officer taking over the position of the assistant director would be able to give evidence based on the records, the learned senior federal counsel chose not to call any witness and close the defendant's case. This is despite the fact that during the case management the court was informed that the defendants will be calling two witnesses. In the light of the plaintiff's testimony that he had no intention to leave Malaysia; that he had married a Malaysian Chinese; that he had adopted a Malaysian Chinese daughter who had just started schooling at that time and that he had incorporated a few companies; in the absence of any evidence from the defendant as to how the first defendant formed his opinion and in the light of the judgment obtained against SEAH, it is my view that there is no basis in law and in fact for the first defendant to issue the certificate.

[22] The learned senior federal counsel's contention that there was no breach of statutory duty cannot stand given the facts and circumstances of this case. Despite the discretionary powers of the first defendant in issuing the certificate, one needs to be reminded of the words of Raja Azlan Shah CJ (Malaya) as His Royal Highness then was in the case of *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, there is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.

[23] Gopal Sri Ram JCA in the case of *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 at p 312 said:

> In a system of Parliamentary democracy modelled along the Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power — the public body — maybe a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors

of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or a class of the general public, as is the case here. At other tunes it is to be exercised for the general good of the nation as a whole, that is to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.

[24] In his judgment in the above-quoted case, Gopal Sri Ram JCA had cited the Sri Lankan case of *Premachandra v Major Montague Jayawickrema* [1994] 2 Sri LR 90 at p 105, wherein GPS De Silva CJ in delivering the judgment of the Supreme Court said:

There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public,to be used for the public good, and the propriety of the exercise of such discretion is to be judged by reference to the purposes for which they were so entrusted.

[25] Salleh Abas LP in the case of *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173 at p 176 said:

… public interest, reason, and sense of justice demand that any statutory power must be exercised reasonably and with due consideration.

[26] In totality, having regard to the facts and circumstances of the case it is my view that the first defendant had acted arbitrarily and unreasonably in issuing the certificate and that the action was not in consonant with the purpose of s 104. Section 104 of the Act empowers the first defendant to issue the certificate for the purposes of collecting and recovering assessed tax from the plaintiff and it is the requirement of s 103 of the Act that a person pays his assessed tax on service of the notice of assessment on him. There was no evidence whatsoever that JHDN had ever made any demand to the plaintiff for the payment of the income tax and neither did JHDN issue Notice of Assessment to the plaintiff. Clearly when the plaintiff's salaries had been deducted by SEAH for the purposes of payment of the plaintiff's income tax and judgment was already obtained against SEAH on 24 October 1981, there was no real purpose for the first defendant in issuing the directive on 17 December 1981 against the plaintiff since s 104(1) of the Act in the circumstances would no longer be applicable. Consequently there was no necessity for the first defendant to issue the certificate except to simply assert that he has the power to do so. Indeed that was the stand taken by the defendants all along; that the first defendant is simply exercising his powers under s 104 of the Act.

[27] The plaintiff had claimed for RM2,935,568.65 for loss of potential earnings. His evidence is that he could have worked outside of Malaysia as an Aviation Department Manager or as a Chief of Maintenance either in Western Europe or the USA. If he had worked in Western Europe as an Aviation Department Manager his loss of potential earnings would be RM2,935,568.65 whereas as a Chief of Maintenance the loss would be RM3,918,085. And if he had worked in the USA, he could have earned RM2,826,440 as an Aviation Department Manager or RM4,434,792.40 as a Chief of Maintenance. The amount of the potential earnings

were derived by the plaintiff from the annual salary survey conducted by the ROTOR & WING INTERNATIONAL magazine published in the USA. The plaintiff finally settled for the post of an Aviation Department Manager in Western Europe and he made deductions of his earnings in Malaysia. Hence the claim for the loss of earnings of RM2,935,568.65. It is my view that on the balance of probabilities the plaintiff had failed to prove the loss of earnings. In my view the plaintiff's testimony that he could have gone to work in Western Europe as an Aviation Department Manager with such amount of salary is merely theoretical which cannot serve as a proof. In the premises this claim is not allowed.

[28] I do not consider that the plaintiff has been falsely imprisoned per se, but on the balance of probabilities I am satisfied that the defendants had acted unreasonably and improperly and was wrong in law and in fact to issue the certificate. The acts and neglects of the defendants had caused the plaintiff worry, stress, anxiety, mental anguish, distress, hurt and helplessness and his mind and self esteem had been injured for more than 16 years, the greatest distress being the denial to visit his ailing father and to attend his father's funeral. The plaintiff gave evidence that at that time he was feeling physically sick and on the point of a complete breakdown. That was, according to the plaintiff, the lowest and saddest period of his life. The plaintiff had also testified that he first arrived in the Federated Sates of Malaya on 9 September 1961. He was then with the British Army, Royal Electrical Mechanical Engineers (REME) seconded to the British Army Air Corps and they were in Taiping supporting 28 Commonwealth Brigade, who were fighting the communists. Hence to be treated by the defendants in such a way has caused him so much agony, having spent half of his life in Malaysia and given his intention to make Malaysia his home.

[29] As regards the amount of damages, the learned senior federal counsel did not make any submission on the quantum, thus no assistance was rendered to the court in this respect whereas learned counsel for the plaintiff cited several authorities wherein after having considered the current exchange rate submitted the amount of general damages in the range of RM11,231,591 to RM208,586,705.72.

[30] In my view the amount submitted by learned counsel for the plaintiff is excessive. For the suffering arising out of the defendant's aforesaid conduct, it is my view that an award of general damages in the sum of RM2m to the plaintiff would be fair and reasonable. As for exemplary damages, the principle in awarding the same has been settled in the case of *Rookes v Barnard* [1964] AC 1129 wherein Lord Devlin stated that one of the categories of cases in which an award of exemplary damages may be made is the case of oppressive, arbitrary or unconstitutional action by the servants of the government. On the facts and circumstances of this case, I am satisfied that the defendants had carried out their powers arbitrarily without any reasonable regard and consideration for the interest of the plaintiff. The plaintiff should therefore be entitled to exemplary damages. *McGregor on Damages* (15th Ed) at para 429 states:

> The conduct of the parties has also been taken into account in the past and … would appear to remain today a relevant consideration in assessing exemplary damages. Thus the court may take into account, according to the decision in *Praed v Graham,* the conduct of the

defendant right down to the time of judgment … An apology by the defendant in the witness box would make a difference in his favour, according to Singleton LJ in *Loudon v Ryder,* while persistence in the charge might increase exemplary damages.

[31] Guided by the aforesaid passage, and in the absence of a fixed formula or rate in awarding exemplary damages, it is my view that a sum of RM1m would be fair in the circumstances. Judgment is therefore entered for the plaintiff for the above sums with interest of 8% per annum from the date of judgment until realization and costs.

Order accordingly.

Reported by Peter Ling